UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION ONE

IGT GLOBAL SOLUTIONS Employer and INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 251 Petitioner	Case No. 01-RC-176909

TEAMSTERS LOCAL 251'S BRIEF

Pursuant to 29 CFR § 102.67(h), Petitioner International Brotherhood of Teamsters, Local 251 ("the Union") submits this Brief in support of its assertion that the Regional Director's decision in *IGT Global Solutions,* Case 01-RC-176909, (Jun. 23, 2016) ("the Decision") is erroneous.

On December 21, 2016, this Board granted the Union's Request for Review of the Regional Director's Decision and Order finding the Request raised substantial issues warranting review. Review was granted as to whether the Regional Director erred, under Sec. 102.66(d) of the Board's Rules and Regulations by permitting the Employer to litigate issues contained in its untimely served Statement of Position, and by finding that the petitioned-for unit was inappropriate under *Specialty Healthcare & Rehabilitations Center of Mobile,* 357 NLRB 934 (2011).

For the reasons stated below, the Regional Director's determination that there is no rational basis to exclude Gaming Service Technicians ["GSTs"] and Field Service Technicians who work exclusively in Connecticut ["CT FSTs"] is clearly erroneous and must be reversed. In

addition, because the Employer violated Section 102.63(b), and Section 102.66(d) provides a mandatory penalty for that violation, the Employer should have been precluded from presenting evidence and cross-examining Petitioner's witnesses on the appropriateness of the petitioned-for unit. The petitioned-for unit should be certified and an election promptly scheduled.

I. The Regional Director Erroneously Concluded That There Is No Rational Basis to Exclude the Disputed Positions from the Petitioned-For Unit

The Regional Director erroneously concluded that there was no rational basis for the Union to exclude three (3) Gaming Service Technicians ["GSTs"] and two (2) Field Service Technicians who work exclusively in Connecticut ["CT FSTs"], from a unit of six (6) Field Service Technicians ["RI FSTs"] who work out of the Employer's West Greenwich, Rhode Island facility. Although the Regional Director correctly determined that the RI FSTs constituted a "readily identifiable group" under *Specialty Healthcare & Rehabilitation Center of Mobile,* 357 NLRB 934 (2011), he failed to properly apply the "overwhelming community of interest" standard set forth in that case.

Under *Specialty Healthcare*,

> [b]ecause a proposed unit need only be **an** appropriate unit and need not be **the only** or **the most** appropriate unit, it follows inescapably that demonstrating that another unit containing the employees in the proposed unit plus others is appropriate, **or even that it is more appropriate**, is not sufficient to demonstrate that the proposed unit is inappropriate.

Id. at 943 (emphasis added). Thus, "[o]nce the Board has determined that employees in the proposed unit share a community of interest, it cannot be that the mere fact that they also share a community of interest with additional employees renders the smaller unit inappropriate." *Id.* In other words, "[i]t is not enough…to suggest a more appropriate unit;" rather, [the Employer] must 'show that the [proposed] unit is clearly inappropriate.'" *Id.* (citations omitted).

To carry its burden, "[t]he proponent of the larger unit must make a "heightened showing" that "**employees in the more encompassing unit share 'an overwhelming community of interest,'** such that there "is **no** legitimate basis upon which to exclude certain employees from it." *Id.* at 943-44 (citing *Blue Man Vegas, LLC v. NLRB*, 529 F.3d 417, 421 (D.C. Cir. 2008). The Board will find that an "overwhelming community of interest" exists only if the two groups' respective community-of-interest factors "overlap almost completely." *Id.* (citing *Blue Man Vegas, LLC*, 529 F.3d at 422. "In determining whether employees in a proposed unit share a community of interest, the Board examines:

> [w]hether the employees are organized into a separate department; have distinct skills and training; have distinct job functions and perform distinct work, including inquiry into the amount and type of job overlap between classifications; are functionally integrated with the Employer's other employees; have frequent contact with other employees; interchange with other employees; have distinct terms and conditions of employment; and are separately supervised.

Id. at 942 (emphasis added).

The proposed unit in this case easily qualities as an appropriate unit under *Specialty Healthcare*. [1] The Employer has failed to satisfy its burden of showing that the proposed unit of RI FSTs shares an overwhelming community of interest with the GSTs and CT FSTs. In light of *Specialty Healthcare*, the Regional Director committed clear error when he concluded that the proposed unit of RI FSTs was a fractured unit, and that there was "no rational basis to exclude" those employees from the proposed unit. To the contrary, the record contains an abundance of legitimate bases for excluding the GSTs and CT FSTs from the proposed unit, including:

[1] In addition, even under the standard cited by Member Miscimarra in his dissent in *Macy's & Local 1445*, 361 NLRB No. 4 (July 22, 2014), based on the facts below, "the interests of the group sought are *sufficiently distinct* from those of other [excluded] employees to warrant establishment of a separate unit."

1. **Different Job Functions and Duties**

   a. **FSTs vs. GSTs**

- The proposed unit of RI FSTs and the GSTs perform **entirely separate job duties**. Petitioner's Exhibit 6 ["Pet'r 6"].
- The GSTs service **casino** gaming machines, slot machines, and electronic casino games, such as video slots. Decision at 2-3. The GSTs work nearly exclusively in Rhode Island[2] and Connecticut[3] casinos. *Id.* at 4.
- On the contrary, RI FSTs conduct the repair and maintenance of Keno devices, instant ticket vending machines (IVTM), and other **lottery** machines located at **convenience stores, bars, and other businesses** located in Rhode Island.
- Notably, while the RI FSTs respond to service requests at Twin River and Newport Grand, they only service Keno, IVTM, and other lottery terminals when they do so. The **RI FSTs never perform work on casino machines, slot machines, and electronic casino games, such as video slots**. Decision at 6. That work is exclusively performed by GSTs. TR 51:10-15 (June 6, 2016).
- The RI FSTs and GSTs use **different equipment**. The RI FSTs use **Cadence**, an electronic paging system that alerts them when service requests arise. The GSTs do not use Cadence. Instead, they use a call center located in Reno, Nevada. TR 41:11-15.
- The respective repair parts that the RI FSTs and GSTs use in their positions are completely incompatible. TR 88:19-89:1.

[2] Twin River Casino and Newport Grand Casino in Rhode Island.
[3] Foxwoods Resort Casino and Mohegan Sun in Connecticut.

b. RI FSTs v. CT FSTs

- The RI FST's work on scratch ticket machines **and** lottery terminals. The CT FSTs **only** work on scratch ticket machines. TR 50:2-13.
- The RI FSTs work on **three** different types of scratch ticket machines: the EDSQ, Gamepoint, and Gemini systems, while the CT FSTs **only** work on EDSQ systems. TR 67:9-14.

2. Organization

- The Employer placed RI FSTs and GSTs in **different departments** at the West Greenwich facility. The FSTs belong to Department 1119, and the GSTs belong to 1052. TR 40-41.
- The Employer's own internal documents reflect a clear and distinct structural division between the job titles, job duties and functions, departments, and work schedules of the proposed unit of RI FSTs, GSTs and CT FSTs.
    - The Employer assigned **different job titles** to the RI FSTs, GST, and CT FSTs. *See* Employer's Exhibit 1 (Ex. 1).
    - The Employer assigned separate, detailed, and differentiated job descriptions and functions to the respective GST and FST positions. *See* Pet'r 6 (four-page chart document which separately lists different GST positions (e.g., "Gaming FST 1; Gaming FST II, etc.) and FST positions (FST 1, FST II, etc.) as chart headings, and lists each positions' respective job duties, functions, expectations, and responsibilities as bullet points beneath job headings.)) To the extent IGT maintains that IGT's current RI FST job descriptions (Pet'r 6) encompass tasks and duties that are interchangeably performed by GSTs, RI FST Howard Bock

["Bock"] sharply disputed the accuracy of the purported job descriptions. TR 91. Specifically, Bock testified that the job descriptions did not accurately describe the work he actually performs as an FST. For instance, to successfully perform his duties as an FST, he was not required to have experience maintaining and repairing electronic gaming machines such as slot machines and video lottery terminals, as IGT claimed. *See* Pet'r 6. Bock testified did not work on those machines at all. *Id.*

- The Employer created three separate and distinct work schedules, one each for RI FSTs, GSTs, and CT FSTs. Pet'r 1.

3. Work Environment and Geographic Location

a. FSTs vs. GSTs

- The RI FSTs and GSTs work in **different locations** and in different work environments.
- The RI FSTs work exclusively in Rhode Island, out of the West Greenwich facility, and only service Rhode Island customers, while the **GSTs** work in casinos in Rhode Island **and Connecticut**. Decision at 4.
- The RI FSTs begin their shifts by reporting to the West Greenwich facility, and then respond to service requests at various Rhode Island locations. They travel to customers' locations and service equipment such as Keno or IVTM's. While in the field, they may receive additional requests, and respond to different locations. They intermittently return to the West Greenwich facility as needed to swap out broken parts and pick up new ones. TR 78:16 -80:10.
- Beth Lyon ["Lyon"], Supervisor of Casino Services, testified that GSTs exclusively work in casinos. TR 38:10-11. The only evidence in the record to the contrary is the one

occasion on which Dan Aueteri ["Aueteri"] repaired a printer. TR 30:11-16. However, at the hearing, Lyon could not provide the location where Aueteri performed this service. *Id.*

- The RI FSTs do not have the same security clearance and access at the Rhode Island casinos as the GSTs. The RI FSTs do not have access to the secure back areas at either Newport Grand or Twin River, but the GSTs do. TR 86:13-25.

b. **RI FSTs v. CT FSTs**

- The RI FSTs and the CT FSTs work in different states. The CT FSTs work from home and **exclusively service customers in Connecticut**. TR 51:10-15.
- The RI FSTs work exclusively in Rhode Island and **only service Rhode Island customers**. Id; *see also* Decision at 4 (acknowledging that "[i]t appears that [RI and CT] FSTs do not work outside their assigned state.")

4. **Frequency of Contact Between RI FSTs and CT FSTs**

- RI FSTs report to the West Greenwich facility on a **daily basis**. The RI FSTs see each other at the facility **nearly every day**, and at least several times per week. TR 88:9-12.
- CT FSTs work from their homes in Connecticut.
- The RI FSTs hardly ever interact with either the CT FSTs Lyon admitted that the CT FSTs came to the West Greenwich facility only **about once a month**, for various company meetings. TR 50:19-24.
- On the rare occasion that the CT FSTs visited the West Greenwich facility, they were entirely unfamiliar with the layout of the building, and needed to ask directions or be shown around in order to navigate the facility. TR 87:21 – 88:8.

5. **Overlap of Job Tasks**

- Although there was some overlap of tasks between RI FSTs and GSTs, it occurred **very infrequently**.
- Apart from delivering parts to GSTs, **there is no other evidence in the record that FSTs ever actually performed GST duties**. TR 35:16-18; TR 37:7-9. The Regional Director acknowledged this much in his decision: "**In the past two months, other than deliver parts to GSTs, FSTs have not done any other GST work.**" Decision at 4; *see also id.* at 6 ("I note, however, this is the only evidence in the record of GST assignments done by the FSTs. **FSTs are not currently assigned to work on slot machines or other video lottery games.")**
- Perhaps most importantly, delivering parts is not germane to the GSTs core job functions -i.e., maintenance of slot machines and electronic casino games. **FSTs were not able to install, repair, or maintain casino machines, as those tasks require specialized training only possessed by GSTs**. *See* TR 87:1-7 (Bock testifying that he could not perform the tasks of a GST, stating "I don't know anything about those machines that they work on.")
- The evidence shows there were only **three** (3) occasions on which Lyon assigned GSTs to tasks ordinarily performed by FSTs. TR 34:5-20; 35:12-15; TR 64:15-18.
- Moreover, the timing of these cross-assignments is suspect. When Petitioner's counsel asked whether GSTs had performed RI FST tasks, Lyon responded that Autieri had replaced a printer – something that is usually done by RI FSTs. TR 30:11-16. When Petitioner's counsel asked Lyon when Autieri performed this service, (TR 31:15-17), Lyon responded that Autieri did so "last week." The petition was filed on May 24, 2016.

Since the hearing took place on June 6, 2016, this would mean that IGT assigned Autieri the task of replacing the printer during the week of May 28 - June 4, 2016 – **after the petition was filed**.

- Lyon testified that, on another occasion, she requested GST Matt Smith ["Smith"] to look at a Gemini Touch communications problem at Twin River Casino – a task normally performed by FSTs – **because he was already at Twin River** for the purpose of performing his usual GST work. TR 32:21-33:15.

6. IGT's Proposed Functional Integration Does Not Suggest an Overwhelming Community of Interest

- Although IGT and G Tech merged in 2015, the resulting merged company ("IGT" or "the Employer") maintains a clear division of operations between casino and lottery services. One half of the company is focused mainly on providing slot machine and electronic casino game repair and maintenance services – the very services that IGT provided before the merger. The other half of the company continues to service lottery terminals and scratch ticket vending machines – as G Tech did before the merger. IGT's employees work in either one of these departments, but not both.
- While the Employer claims that it intends to functionally integrate the job duties of GSTs and RI FSTs in the future, there is virtually no evidence that IGT has thus far taken any concrete actions to that effect. As the Regional Director noted:

> As part of the Employer's effort to streamline and reorganize its business, supervisor Beth Lyon has attempted to integrate the jobs of GSTs and FSTs. The record demonstrates that the Employer is in the process of instituting that plan by requiring all FSTs and GSTs to undergo cross-training. The Employer concedes that while complete integration between GSTs and FSTs is the plan for the future, full integration has not yet been accomplished due to scheduling issues.

Decision at 3 (emphasis added).

- However, apart from requiring RI FSTs to take several online courses regarding gaming machines, (TR 95:25 – TR 96:6), **there is no evidence in the record that any other cross-training has taken place.** Notably, RI FSTs have also not received any hands-on training in installing, repairing, and maintaining casino machines. Thus, the Regional Director inappropriately considered IGT's claims about its future intentions, instead of looking at how the parties actually behaved to determine whether the disputed employees shared an overwhelming community of interest with the proposed unit at the time the petition was filed. Future intent is completely irrelevant.

7. **Job Requirements, Degree of Skill, Required Training**

a. RI FSTs vs. GST

- Because slot machines and other electronic casino games are more complex than traditional lottery terminals, the GST positions required a greater degree of skill than the FST positions. TR 87:1-7; TR 91:1-13. For example, Bock testified that he had no idea how to operate or repair slot machines, or how to repair electronic casino gaming systems. *Id*
- Unlike the RI FST position, the GST position required highly specialized training. Before the petition was filed, the GSTs were flown out to other locations to receive special training. TR 39:10-11. On the other hand, the FSTs have never been provided special training opportunities and have not been flown out to trainings.

b. RI FSTs vs. CT FSTs

- The CT FSTs also received different training from the RI FSTs. TR 66:17-23. Moreover, as noted above, the CT FSTs do not service Keno or other lottery terminals. TR 50: 2-11; Decision at 3.

8. **Company-Wide Benefit Package and Merit Program**

- Although the RI FSTs and the disputed employees are subject to the same merit program and benefits package, both of these policies are company-wide policies. TR 23:9- 25:25; TR 73:2-23; TR 89:18-22. There are approximately 1,000 employees at IGT, and the merit program and benefit packages apply equally to sales techs, (software engineers, human resource employees, etc.). *See, e.g.*, TR 73:5-8. Accordingly, this factor should bear no weight.

II. The Regional Director Erroneously Applied NLRB Procedural Rules And Deviated From Established Board Precedent

The Regional Director's determination that the disputed unit would make a better unit than the petitioned-for unit is contrary to officially reported Board precedent. The Regional Director also erred with respect to the following issues:

- Given the many significant distinctions between the proposed unit and the disputed employees, the Regional Director erred by concluding that the proposed unit was a "fractured unit." *See, e.g., Specialty Healthcare*, 357 NLRB at 946 ("the proposed unit of all CNAs is in no way a fractured unit simply because a larger unit containing the CNAs and other employee classifications might also be an appropriate unit or even a more appropriate unit.")
- The above-noted distinctions provide more than enough of a legitimate basis for excluding the disputed employees from the proposed unit, and strongly undermine the Regional Director's conclusion that an overwhelming community of interest existed between the groups.
- This is clearly not a case where the **"distinctions are too slight or too insignificant to provide a rational basis for a unit's boundaries."** *Specialty Healthcare*, 357 NLRB at

946. Nor does the petitioned-for-unit represent an "arbitrary segment" of what would be an appropriate unit. *Id.* (citing *Pratt & Whitney,* 327 NLRB 1213, 1217 (1999). Therefore, the Regional Director was required to find that the petitioned-for unit was an appropriate unit under *Specialty Healthcare*.

- Moreover, the Regional Director erred by concluding there was an overwhelming community of interest based on common supervision, functional integration, and benefits alone. *See, e.g., Dpi Secuprint, Inc. & Graphic Commc'ns Conference/international Bhd. of Teamsters, Local 503-m, Petitioner*, 362 NLRB No. 172 (Aug. 20, 2015) (common supervision, functional integration, same benefits, and roughly similar pay rates **do not establish an overwhelming community of interest**; further finding that evidence of interchange and contact between the petitioned-for and offset-press employees was insufficient to establish an overwhelming community of interest, and that the petitioned-for unit was not "fractured."); *Dtg Operations, Inc. & Teamsters Local Union No. 455, Int'l Bhd. of Teamsters*, 357 NLRB 2122 (2011) (**no overwhelming community of interest despite common supervision, functional integration, and similar benefits and base wages**).
- Even if some functional integration has taken place, the mere fact of functional integration is not enough to establish that the employees shared an overwhelming community of interest. The job functions of the employees must be highly integrated to establish an overwhelming community of interest. *Specialty Healthcare*, 357 NLRB at 948, n.4 (*citing Ramada Inns, Inc.,* 221 NLRB 689, 690 (1975) (**only "if functions and mutual interests are *highly integrated* [is] an overall unit alone appropriate")** (emphasis added); *see also Home Depot,* USA, 331 NLRB 1289, 1289 (2000) ("we

disagree … that this evidence of job overlap and employee interchange is *significant enough* to warrant the conclusion that the [petitioned-for] drivers do not constitute a functionally distinct group with a distinct community of interest") (emphasis added).

- Although the Regional Director cited *Odwalla, Inc.*, 357 NLRB 1608, 1611-13 (2011), that case is not applicable to the facts of the present case. While the Regional Director cited *Odwalla* for the proposition that the proposed unit is fractured because it does "not track **any** lines drawn by the employer, such as classification, department, function, or lines of supervision," this is starkly at odds with the facts of this case. Here, the Employer separated the RI FSTs, GSTs, and CT FSTs by assigning them **different titles**, placing them in **different departments**, assigning them **different work schedules**, and assigning **them completely separate job functions**. *See* Ex. 1; Pet'r 1.
- The Regional Director concluded that the following two factors outweighed the 10+ factors supporting the petitioned-for unit: 1) GSTs have taken SOME of the same training courses as FSTs, and 2) over 1000 IGT employees, including the three GSTs and six FSTs, have the same company-wide benefit package (excluding wages). Not only did the Regional Director apply an incorrect balancing test (rather than the proper standard), it incorrectly balanced the factors. Even under a standard permitting the Regional Director to weigh the factors and determine the most appropriate unit, the Regional Director erred. But the error is particularly evident in light of this Board's *Specialty Healthcare* decision, which REQUIRES the Regional Director to certify the petitioned-for unit unless THE EMPLOYER carries its burden of proving that there "is **no** legitimate basis upon which to exclude certain employees from it." IGT has clearly failed to carry its burden.

Finally, there is no dispute that the Employer violated Section 102.63(b) of the National Labor Relations Board's Rules and Regulations by failing to timely provide the Union with EITHER a position statement or the required list of employees. In fact, the Employer NEVER provided the documents. The list of employees was provided on the morning of the representation hearing by the Hearing Officer after Petitioner's attorney asserted she had not received it. TR. 9. Section 102.66(d) provides, "[a] party **shall** be precluded from raising any issue, presenting any evidence relating to any issue, cross-examining any witness concerning any issue, and presenting argument concerning any issue that the party failed to raise in its timely Statement of Position." Further, "[i]f the employer fails to timely furnish the lists of employees described in §§102.63(b)(1)(iii),(b)(2)(iii), or (b)(3)(iii), the employer shall be precluded from contesting the appropriateness of the proposed unit at any time and from contesting the eligibility or inclusion of any individuals at the pre-election hearing, including by presenting evidence or argument, or by cross-examination of witnesses." The Rule is mandatory and does not give a hearing officer the authority to waive the provision. *See also* NLRB Frequently Asked Questions: 2015 Representation Case Procedures:

> **Q:** What happens if the employer fails to timely submit the lists with its statement of position? **A:** Section 102.66(d) states that if the employer fails to timely furnish the required lists of employees, **the employer will be precluded from contesting the appropriateness of the proposed unit at any time and from contesting the eligibility or inclusion of any individuals at the pre-election hearing, including by presenting evidence or argument, or by cross-examination of witnesses.**

Even if the Rule gave the Hearing Officer discretion to waive the Employer's failure to timely provide a position statement and list of employees, the Employer demonstrated no reason for failing to provide the required documents timely (OR AT ALL). The Hearing Officer simply declined to enforce the rule, **without giving a reason for her decision**, other than "I mean we

discussed this with the Regional Director earlier. We're going to allow the evidence in." *See* TR. 8-9. This is clear error that requires reversal of the Regional Director's decision and a certification of the petitioned-for unit.

In the Board's Order granting review, Member Miscimarra stated that the issue is governed by Sec. 9(b) of the Act, and that the Regional Director should not be precluded from determining the appropriateness of the unit. The Union does not disagree that the Hearing Officer had every right and duty to consider the appropriateness of the petitioned for unit, applying Board precedent, and based on the evidence presented by the Petitioner. What the Hearing Officer was precluded from considering, however, was evidence offered by the employer. Additionally, the Employer should not have been permitted to cross-examine the Union's witnesses. The Board addresses this issue in the Representation—Case Procedures, 79 FR 74308-01:

> the final rule does not permit the Board to direct an election in an inappropriate unit simply because the employer does not suggest an alternative unit in the Statement of Position. Moreover, contrary to comments by ALFA and ACE, among others, the Board has not shifted the burden. The final rule is consistent with Allen Health Care Services, 332 NLRB 1308 (2000), in which the Board held that even when an employer refuses to take a position on the appropriateness of a proposed unit, the regional director must nevertheless take evidence on the issue unless the unit is presumptively appropriate. **The final rule thus permits the petitioner to offer evidence in such circumstances and merely precludes non-petitioners, which have refused to take a position on the issue, from offering evidence or cross-examining witnesses.**

Id. at *74366.

Conclusion

Based on the foregoing, the Employer clearly failed to carry its burden of proving that there is no rational basis to exclude the GSTs (who perform different functions, have different training, work in different departments, have different job titles, use different call systems, and have minimal interchange) from the petitioned-for unit. Likewise, the Employer failed to carry its burden of proving that there is no rational basis to exclude the CT FSTs (who perform different functions, do not interact with RI FSTs, and do not even work in the same state with RI FSTs) from the petitioned-for unit. In addition, pursuant to Section 102.66(d), the Employer must be precluded from contesting the appropriateness of the unit. The petitioned-for unit should be certified and an election promptly scheduled.

Respectfully submitted,
Teamsters Local 251
By its Attorneys,

/s/ Elizabeth Wiens, Esq.
Elizabeth Wiens
Gursky|Wiens, Attorneys at Law, Ltd.
420 Scrabbletown Road
North Kingstown, Rhode Island
401.294.4700 phone
401.294.4702 fax
ewiens@rilaborlaw.com

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the within document with the National Labor Relations Board First Region and served a copy upon the following counsel of record on the 16th day of January, 2017 via First Class U.S. Mail, postage prepaid.

Regional Director-Region 1

Theo M. Gould

/s/ Jessica Marsh